FILED

(1)

No. 97-453 JUN 16 1997

OFFICE OF THE CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1996

ELKO COUNTY GRAND JURY,
*Petitioner*,

v.

BEN SIMINOE,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

JOHN S. McGIMSEY
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39 pp

## QUESTIONS PRESENTED FOR REVIEW

**ISSUE ONE:** Does a federal district court, upon removal of a state court contempt action against a federal officer or employee who has refused to obey a state court subpoena, lack jurisdiction to decide whether the officer or employee has been properly instructed by his agency to disobey the subpoena pursuant to 5 U.S.C. Section 301 and the agency rules promulgated thereunder (Touhy regulations, United States ex rel Touhy v. Ragen, 340 U.S. 462 (1951) by reason of the doctrine of derivative jurisdiction as held in the instant case from the Ninth Circuit Court of Appeals; or do the federal courts have jurisdiction to examine the merits of the refusal as a claim of privilege by the United States as the Eleventh Circuit Court of Appeals did in Cohen v. Florida, 887 F.2d 1455 (11th Cir. 1989); or does the court have jurisdiction to convert the contempt action to an action under the Administrative Procedure Act to determine the propriety of the refusal under the Touhy regulations as the Seventh Circuit Court of appeals did in Edwards v. Department of Justice, 43 F.3rd 312 (7th Cir. 1994)?

**ISSUE TWO:** Does a state court in a grand jury investigation lack jurisdiction to compel the attendance of a Department of Agriculture officer or employee by subpoena?

## PARTIES TO THE PROCEEDING

The parties to the proceeding, in addition to those named in the caption, are the United States of America, United States Department of Agriculture, and the United States Forest Service.

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## REFERENCE TO OPINIONS

The Ninth Circuit Court of Appeals' opinion in Docket No. 96-16394 is published at 109 F.3d 554 (1996 9th Cir.). This opinion was filed on March 19, 1997.

## JURISDICTION OF THE SUPREME COURT

Petitioner seeks review of the Opinion of the Ninth Circuit Court of Appeals filed on March 19, 1997, in Docket No. 96-16394. Jurisdiction is conferred by 28 U.S.C. 1254.

## STATUTES AND REGULATIONS AT ISSUE

5 U.S.C. 301 (text)

> The head of an executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limit the availability of records to the public.

7 C.F.R. Section 1.210

> This subpart sets forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in

judicial or administrative proceedings when such appearance is in their official capacity or arises out of or is related to their employment with USDA. These regulations do not apply to appearances by USDA employees as witnesses in judicial or administrative proceedings which are purely personal or do not arise out of or relate to their employment with USDA. This subpart also does not apply to congressional requests or subpoenas for testimony or documents.

7 C.F.R. 2.11

(a) Administrative proceeding means any proceeding pending before any federal, state or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits or other rulings, or the adjudication of any matter, dispute or controversy.

(b) Appearance means testimony or production of documents the request for which arises out of an employee's official duties with USDA or relates to his or her employment with USDA. For the purpose of this subpart, an appearance also includes an affidavit, deposition, interrogatory, or other required written submission.

(c) Judicial proceeding means any case or

controversy pending before a federal, state or local court.

## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

On March 4, 1996, the Elko County Grand Jury caused a subpoena to be served on Ben Siminoe, an employee of the United States Forest Service, requiring him to testify before it. The United States filed a motion to quash the subpoena in the Fourth Judicial District Court of the State of Nevada claiming that Siminoe was prohibited by regulations of the Department of Agriculture from testifying, and that the supremacy clause and lack of jurisdiction in the state court prevented enforcement of the subpoena. The Grand Jury opposed the motion to quash on the ground that the regulations relied on by the Forest Service did not, by their terms, apply to subpoenas issued by a state grand jury. The state court stayed enforcement of the subpoena pending a hearing on April 26, 1996.

On April 10, 1996, prior to the hearing, Siminoe's supervisor, a Regional Forester in Ogden, Utah, claiming the authority of the so-called housekeeping statute, 5 U.S.C. 301, and the regulations governing Forest Service employees promulgated under it, directed Siminoe not to obey the subpoena.

At the conclusion of the hearing, the state court lifted the stay and held that if the Grand Jury issued a second subpoena and if Mr. Siminoe did not obey it, he would be in contempt of the state court. The state court's decision was based upon its

conclusion that 5 U.S.C. 301 and the Tenth Amendment to the federal constitution did not authorize regulations to be promulgated which would permit USDA to refuse to allow the employee to testify, nor did the language of the regulations authorize the federal employee to refuse to obey the subpoena.

A second subpoena was issued and served on May 17, 1996. The United States removed the case to the Federal District Court on May 24, 1996, pursuant to 28 U.S.C. 1442 (a)(1), and moved to quash the second subpoena on the grounds that the federal district court lacked jurisdiction on removal to enforce the subpoena because of the derivative jurisdiction doctrine, the supremacy clause barred enforcement of the subpoena, the intergovernmental immunity doctrine barred enforcement of the subpoena, sovereign immunity barred enforcement of the subpoena, and finally, because the Touhy doctrine afforded protection to Mr. Siminoe.

The Grand Jury moved to remand the case to state court on the ground that Siminoe was not acting within the course and scope of his employment in refusing to testify before the state court and because the regulations did not apply to a grand jury subpoena. Alternatively, the grand jury opposed the motion to quash.

The federal district court, by minute order, quashed the state court subpoena on July 12, 1996. On July 22, 1996, the Grand Jury filed its Notice of Appeal to the Ninth Circuit Court, which, on the 19th day of March, 1997, affirmed the decision of

the District Court.

## STATEMENT OF FACTS

The Grand Jury of Elko County, Nevada, was convened to investigate whether state and federal officials involved in managing public lands in Elko County were criminally using their positions to further land management policies not in keeping with the official policy of the United States Forest Service and the Bureau of Land Management. In order to ascertain the nuances of those policies, not discernable from the written policies, the Grand Jury first sought to have a Deputy District Attorney speak with Mr. Siminoe, a Forest Service Supervisor of the Humboldt National Forest in Elko County. Mr. Siminoe would not return the phone call, so he was subpoenaed.

The following day, Department of Justice attorneys informed the Grand Jury that Mr. Siminoe was prohibited by federal law from testifying without Department of Agriculture permission, which permission would not be given unless the Grand Jury revealed the specific subject matter of the proposed testimony, whether Siminoe was a target of the Grand Jury, the specific conduct of any federal employees who were being investigated, the date and length of Siminoe's expected testimony, how many other Forest Service employees would be requested to testify, and any other useful information. The Department of Justice attorneys also requested a delay for Mr. Siminoe's appearance while they

considered the information to be provided.

The Elko County District Attorney, counsel for the Grand Jury, answered the questions raised within the bounds permitted under state law regarding grand jury secrecy, specifically that Siminoe was not a target of the Grand Jury and that his anticipated testimony would consist of background information regarding land management policies of the Forest Service, but declined to grant additional time for forest service consideration of that information.

By letter dated April 10, 1996, see Appendix C, Dale Bosworth, Regional Forester for the Intermountain Region of the Forest Service, informed Siminoe that he was not authorized to testify before the Grand Jury, stating that to do so was not in the best interest of the USDA, that the investigation was illegal, was a violation of the Supremacy Clause, would create an undue burden on the USDA, and would intimidate and interfere with USDA employees acting in the course and scope of their employment because it would embolden other western counties to create grand juries to investigate whether United States employees and officials in other areas were committing crimes.

## REASONS FOR ALLOWANCE OF THIS WRIT

1. The Ninth Circuit Court of Appeals held that the federal district court did not have jurisdiction to consider the contempt case on its merits. Decisions from the Eleventh Circuit Court of Appeals and the Seventh Circuit Court of Appeals under substantially identical procedural facts implicitly hold to the contrary.

2. The Ninth Circuit Court of Appeals has not given effect to the 1958 Amendment of 5 U.S.C. Section 301.

## LEGAL ARGUMENT

**ISSUE I**

Does a federal district court, upon removal of a state court contempt action against a federal officer or employee who has refused to obey a state court subpoena, lack jurisdiction to decide whether the officer or employee has been properly instructed by his agency to disobey the subpoena pursuant to 5 U.S.C. Section 301 and the agency rules promulgated thereunder (Touhy regulations) by reason of the doctrine of derivative jurisdiction as held in the instant case from the Ninth Circuit Court of Appeals; or do the federal courts have jurisdiction to examine the merits of the refusal as a claim of privilege by the United States as the Eleventh Circuit Court of Appeals did in Cohen v. Florida, 887 F.2d 1455 (11th Cir. 1989); or does the court have jurisdiction to

convert the contempt action to an action under the Administrative Procedure Act to determine the propriety of the refusal under the Touhy regulations as the Seventh Circuit Court of appeals did in Edwards v. Department of Justice, 43 F.3rd 312 (7th Cir. 1994)?

The instant case is one of several procedurally identical cases rising in the Ninth Circuit. The sequence is, with unimportant exceptions, always as follows: A subpoena is issued by a state court to secure testimony or the production of documents from a federal employee. The federal employee, upon instruction from his agency premised on the housekeeping regulations, declines to testify and is held in contempt of the state court. The contempt case (and sometimes the underlying case) is removed to federal district court, which holds that it lacks jurisdiction to examine the refusal to testify or produce documents on the merits because the state court, from which the federal court acquired jurisdiction, lacked jurisdiction to issue the subpoena, and dismisses the contempt case. By this procedure, the subpoenaing party is forced to file a collateral action under the Administrative Procedure Act to get a federal district court to address the issue of whether the agency refusal is authorized. The Grand Jury was forced into a lawsuit because, without violating Nevada secrecy provisions governing grand juries, it could not produce the information USDA or the Department of Justice attorneys wanted.

Initially, the Ninth Circuit is wrong because it allowed the district court to decline to examine, under any test, whether the

refusal of the federal employee and his agency had any merit at all. Courts always have jurisdiction to determine their own jurisdiction, United States v. United Mine Workers of America, 330 U.S. 258 (1947) and Tarbles case, 80 U.S. (13 Wall) 397 (1872). In Tarbles the Supreme Court clearly authorized the Wisconsin state court to decide whether the claim of the federal employee to be acting within the scope of his employment and authority, in that case an army officer, was a sham or a farce before it was prevented by the supremacy clause from taking any further action.

In Florida v. Cohen, 887 F.2d 1451 (1989 11th Cir.), a state court involved in a capital murder prosecution issued subpoenas to several federal employees for their testimony and records at the behest of the Defendant. The federal employees, based on the Touhy regulations of the Department of Justice, did not obey the state court subpoena. The Florida state court initiated contempt proceedings against the federal officers. The United States caused the contempt case, but not the underlying murder case, to be removed to federal court pursuant to 28 U.S.C. 1442(a)(1).

On appeal from the district court, the Eleventh Circuit observed that, "Neither party challenges the district court's determination that the refusal of the federal officials to provide the requested information should properly be assessed as an invocation of privilege to be evaluated by the federal courts." Both the district court and the court of appeals decided the case on its merits; i.e.,

by balancing the public interest of the federal government against the right of Ms. Cohen to prepare her defense.

It is plain that had Cohen been heard in the Ninth Circuit, that Circuit would have held that the state court did not have jurisdiction to hold a federal officer in contempt, and that the doctrine of derivative jurisdiction prevented the district court and then the Ninth Circuit Court from having jurisdiction to examine the case on its merits.

In Edwards v. U.S. Department of Justice, 43 F.3rd 312 (7th Cir 1994), there was an order for production of documents by a state court, on behalf of a criminal defendant, directed to the Department of Justice. The Department of Justice refused to produce the documents citing their Touhy regulations. A contempt citation and removal to a federal district court followed. The court converted the contempt action to an action under the Administrative Procedure Act and addressed the validity of the agency's refusal to produce the documents on the merits. Obviously, the Seventh Circuit assumed jurisdiction of the underlying contempt case, a result that could not occur if it lacked any jurisdiction to proceed at all as the Ninth Circuit holds.

It is settled law that subject matter jurisdiction cannot be waived or conferred by the parties, Mitchell v. Maurer, 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed. 338 (1934). Absent any other explanation, the Ninth Circuit and the Eleventh Circuit, under procedurally identical facts, reach diametrically opposed

conclusions about jurisdiction. It appears that the Seventh Circuit is in accord with the Eleventh Circuit. The Fourth Circuit, Boron Oil Co. v. Downie, 873 F.2d 67 (CA 4th 1989) agrees with the Ninth Circuit.

In State of Kansas v. Call, 760 F. Supp 190 (D Kansas 1991), DEA agents declined to testify as expert witnesses in a state court criminal action. A contempt action was initiated and subsequently removed to federal court. The district court reached the merits of whether the agencies denial of permission to the agents to testify was proper. No consideration of the doctrine of derivative jurisdiction appears in the opinion.

In Dent v. Packerland Packing Co., Inc., 144 F.R.D. 675 (D. Neb 1992), in a civil action, Plaintiff sought discovery from USDA employees. The USDA refused to allow the discovery based on the Touhy regulations. The case was removed and decided on the merits by the federal district court.

**ISSUE II**

Does a state court in a grand jury investigation of criminal activity lack jurisdiction to compel the testimony of a Department of Agriculture employee by subpoena?

In Boske v. Comingore, 177 U.S. 459, 469 (1900), the Supreme Court held that the refusal of an Internal Revenue Service employee, pursuant to IRS regulations, to produce records subpoenaed by a prosecutor violated no statute "which expressly or by necessary implication forbade the adoption of such

regulation." Boske, however, did not establish a privilege from ever having to produce the records, it merely allowed the Secretary of the Treasury to establish a procedure which protected the department and the persons affected by the records.

In United States ex rel Touhy v. Ragen, 340 U.S. 462 (1951), the Supreme Court reaffirmed Boske, but did not expand it.

In United States v. Reynolds, 345 U.S. 1 (1953), the Supreme Court devised a balancing test between the need of the government to preserve military secrets and a private litigant's right to discovery under procedurally identical facts. Even though in that case the Air Force claimed a privilege under the housekeeping act, that issue was largely ignored by the Supreme Court and the decision rested on grounds of military secrecy.

In 1958, Congress amended 5 USC Section 301, by adding the last sentence: "This section does not authorize withholding information from the public or limit availability of records to the public."

The amendment was added because:

"...Over the years...the housekeeping statute became a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws.", Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3rd 774 (9th Cir 1994).

Yet, in this case, the Regional Forester in Ogden, Utah,

premising his claim upon 5 USC 301 and Department of Agriculture regulations promulgated thereunder, refuses permission to a USDA employee to testify because:

1. The Elko County Grand Jury inquiry into Forest Service land management policies and procedures violates the Supremacy Clause of the United States Constitution.

2. The Elko County Grand Jury inquiry into Forest Service land management policies and procedures would be unduly burdensome.

3. The Elko County Grand Jury would impermissibly intimidate and interfere with Forest Service employees acting in the course and scope of their employment.

The refusal of the Regional Forester to allow the testimony of the employee does not establish or refer to a procedure for protecting the integrity of records or for protecting employees, or protecting the confidentiality of records. Rather, it is a blanket refusal to provide information in direct contravention of the teachings of Ragen, Boske, Reynolds, and the 1958 Amendment to 5 USC 301.

Whatever merit the argument that the Grand Jury was violating the supremacy clause might have, the Ninth Circuit never reached the issue, grounding its decision solely on the lack of derivative jurisdiction.

Invocation of sovereign immunity as a defense which prevents the contempt action requires valid regulations, for if the

refusal is not authorized, the employee cannot be acting on behalf of the United States, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1948). Interpretation of the legality of the regulations, the Ninth Circuit held, "must await another day."

The Grand Jury's point is that the decision in this case turned solely on the alleged lack of jurisdiction, which required or allowed the federal courts to turn a blind eye to the USDA's claim of an absolute privilege not to have its employees testify under 5 U.S.C. Section 301.

## CONCLUSION

For the reasons set forth above, specifically that there is a split in the circuits regarding the derivative jurisdiction doctrine, and because the Ninth Circuit Court has approved an absolute privilege not to testify for federal officers and employees, the Grand Jury of Elko County prays that this Court allows the writ.

DATED this 21st day of August, 1997.

John S. McGimsey
Chief Deputy District Attorney
Elko County District Attorney's Office
575 Court Street
Elko, Nevada 89801

Attorney for Petitioner

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| IN RE: ELKO COUNTY GRAND JURY, Subpoena Served on: BEN SIMINOE, Assistant Forest Supervisor, U.S. Department of Agriculture, Forest Service.<br><br>ELKO COUNTY GRAND JURY,<br>*Appellant,*<br><br>v.<br><br>BEN SIMINOE, Assistant Forest Supervisor, U.S. Department of Agriculture, Forest Service,<br>*Appellee.* | No. 96-16394<br>D.C. No.<br>CV-96-00336-ECR<br>OPINION |

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Submitted March 10, 1997*
San Francisco, California

Filed March 19, 1997

Before: Alfred T. Goodwin, Melvin Brunetti, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Brunetti

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

## SUMMARY

### Civil Litigation and Procedure/Removal and Remand

The court of appeals dismissed an appeal. The court held that a federal district court lacks jurisdiction over a removed claim that a federal agency's regulation cannot bar its employee from complying with a state grand jury's subpoena.

Appellant Elko County Grand Jury subpoenaed Ben Siminoe, an employee of the United States Forest Service. Pursuant to regulations of the United States Department of Agriculture (USDA), the Forest Service instructed Siminoe not to appear and testify as required by the subpoena.

A Nevada state court ruled that the Grand Jury could validly subpoena federal employees and seek an arrest warrant on their refusal to comply. Siminoe removed the case to federal court pursuant to 28 U.S.C. § 1442 and moved to quash the subpoena. The district court quashed the subpoena and refused to remand. The Grand Jury appealed.

[1] Because the case was removed from state court pursuant to § 1442, the court of appeals' jurisdiction was derivative of the state court's. If the state court lacked jurisdiction, the federal court acquired none.

[2] The authority for the USDA regulations governing the appearance of employees as witnesses is 5 U.S.C. § 301, which states that the head of an Executive department may prescribe regulations for the conduct of its employees. [3] USDA set forth procedures governing the appearance of employees as witnesses in judicial or administrative proceedings, in their official capacity, or in relation to their employment. The regulations state that no USDA employee may provide testimony or produce documents in judicial or administrative proceedings "unless authorized in accordance with this subpart."

[4] Subordinate federal officers cannot be held in contempt for failing to comply with a court order in reliance on a validly promulgated regulation to the contrary. [5] The Forest Service denied Siminoe permission to appear and he based his refusal to testify on that decision.

[6] Cases involving § 1442(a) removals of state subpoena proceedings against unwilling federal officers have held that sovereign immunity bars enforcement of the subpoena. The Forest Service's refusal to allow Siminoe to testify was an express application of this immunity.

[7] The state court lacked jurisdiction to subpoena Siminoe and could not have issued a bench warrant had he refused to comply with the subpoena, regardless of any court's interpretation of the regulations. The court of appeals lacked jurisdiction to weigh the argument that § 301 barred the Forest Service from refusing to comply with the subpoena. The means for challenging the USDA's decision was an action under the Administrative Procedure Act.

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## COUNSEL

Gary D. Woodbury, Elko County District Attorney, Elko, Nevada, for the appellant.

Mark B. Stern, United States Department of Justice, Washington, D.C., for the appellee.

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## OPINION

BRUNETTI, Circuit Judge:

The Elko County Grand Jury appeals from a district court order granting the Government's motion to quash a state subpoena and denying the Grand Jury's motion to remand.

Appellant issued a subpoena to Ben Siminoe, a Forest Service employee. After the Forest Service instructed Siminoe not to appear and testify pursuant to United States Department of Agriculture ("USDA") regulations, a Nevada state court ruled that the Grand Jury could validly subpoena federal employees and could petition for a bench warrant upon the federal officials refusal to comply with the subpoena. After re-issuance of the subpoena, Siminoe, represented by the Department of Justice, removed the case to the United States District Court pursuant to 28 U.S.C. § 1442. The district court quashed the subpoena and refused to remand the case, and Appellant timely appealed. We affirm the district court's decision.

I.

[1] Initially we note that because this case was removed from state court pursuant to § 1442, our jurisdiction is derivative of the state court's jurisdiction. *See Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U.S. 377, 382 (1922) ("The jurisdiction of the federal court on removal is, in a limited sense, derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none . . . ."); *see also Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986) (same). Because we conclude that the state court lacked jurisdiction to issue the subpoena, we must dismiss the case on that ground.

II.

[2] The Forest Service refused to allow Siminoe to testify pursuant to USDA regulations governing the appearance of employees as witnesses. *See* 7 C.F.R. §§ 1.210-1.214. The authority for these regulations stems from 5 U.S.C. § 301, which states:

> The head of an Executive department . . . may prescribe regulations for the government of his depart-

> ment, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

[3] The Department of Agriculture issued regulations based on this statute which "set forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings when such appearance is in their official capacity or arises out of or is related to their employment with USDA." 7 C.F.R. § 1.210. Judicial proceedings are defined as "any case or controversy pending before any federal, state, or local court." 7 C.F.R. § 1.211(c). The regulations also state that "[n]o USDA employee may provide testimony or produce documents in judicial or administrative proceedings unless authorized in accordance with this subpart." 7 C.F.R. § 1.212.

## III.

The appellant proffers a variety of arguments why the USDA regulations do not apply here. Appellant contends that a grand jury proceeding does not fall under the definition of a "judicial proceeding" because it is not a case or controversy before a court. It also argues that 5 U.S.C § 301's language stating that it "does not authorize withholding information from the public" constitutes a waiver of sovereign immunity and also bars the Forest Service from preventing Siminoe's compliance with the subpoena.

Because we ultimately find that we do not have jurisdiction to review their appeal, we will not examine the merits of these arguments.

## IV.

[4] Instead, we examine the jurisdictional issues presented when a state entity subpoenas a federal official. The United

States argues that the *Touhy* doctrine applies in this case to bar state jurisdiction to subpoena federal employees. This court has interpreted *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951) to hold that "subordinate federal officers could not be held in contempt for failing to comply with a court order in reliance on a validly promulgated regulation to the contrary." *Swett*, 792 F.2d at 1451.

[5] Here, the relevant Department of Agriculture regulations essentially bar a USDA official from appearing in "a judicial or administrative proceeding unless authorized in accordance with this subpart." 7 C.F.R. § 1.212. The Forest Service denied Siminoe permission to appear and he based his refusal to testify on that decision.

[6] The Grand Jury interprets 5 U.S.C. § 301 to constitute a waiver of sovereign immunity. We disagree. As the Seventh Circuit has noted previously, "cases involving § 1442(a) removals of state subpoena proceedings against unwilling federal officers have held that sovereign immunity bars the enforcement of the subpoena." *Edwards v. Dep't. of Justice*, 43 F.3d 312, 317 (7th Cir. 1994). Appellant is also unable to demonstrate that the United States waived its sovereign immunity. If anything, the Forest Service's refusal to allow Siminoe to testify is an express application of this immunity. *See Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989) (holding that subpoena of federal official falls within protection of sovereign immunity); *United States v. McLeod*, 385 F.2d 734, 750-52 (5th Cir. 1967) (same).

[7] In addition, the state court lacked jurisdiction to subpoena Siminoe and could not have issued a bench warrant had he refused to comply with the subpoena. This is true regardless of any court's interpretation of the appropriate regulations. "[A] consideration of the merits can play no part in our decision." *Swett*, 792 F.2d at 1452; *see also In re Boeh*, 25 F.3d 761, 764-65 & n.4 (9th Cir. 1994). We have no jurisdiction to weigh appellant's argument that 5 U.S.C. § 301 bars

the Forest Service from refusing to comply with the subpoena. Any interpretation of the legality of the regulations as authorized by 5 U.S.C. § 301, must await another day.[1]

AFFIRMED.

[1]The appropriate means for challenging the Department of Agriculture's decision under *Touhy* is an action under the Administrative Procedure Act in federal court. *See, e.g., Swett*, 792 F.2d at 1452 n.2.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

(Filed July 12, 1996)

| | | |
|---|---|---|
| IN RE ELKO COUNTY GRAND JURY SUBPOENA SERVED ON: | ) | CV-N-96-336-ECR(RAM) |
| BEN SIMINOE, Assistant Forest Supervisor, U.S. Department of Agriculture, Forest Service. | ) | MINUTES OF THE COURT |
| | ) | DATE: July 12, 1996 |

PRESENT: EDWARD C. REED, JR. U.S. District Judge

Deputy Clerk: MARTI CAMPBELL

Reporter: NONE APPEARING

Counsel for Plaintiff(s) NONE APPEARING

Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

Mr. Siminoe, represented by the United States Attorney, has filed a motion (document #3) to quash a subpoena served on him by the Elko County Grand Jury.

IT IS, THEREFORE, HEREBY ORDERED that said motion (document #3) to quash the subpoena is GRANTED.

The Elko County Grant Jury, represented by the

Elko County District Attorney, filed a motion (document #6) to remand the matter to state court. The United States Attorney has filed a response (document #11) to said motion to remand.

IT IS FURTHER ORDERED that the motion to remand is DENIED. The subpoena is directed against a federal official acting in his official capacity and the question whether such official is subject to a state grand jury subpoena and must testify before such a grand jury is governed by federal statutes and regulations and makes the action subject to removal to this court.

LANCE S. WILSON, CLERK

By /s/ Marti Campbell
Deputy Clerk

United States Department of Agriculture | Forest Service | Intermountain Region | 324 25th Street Ogden, UT 84401-2310

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File Code: 1570-1
(Log No. 15-96)

Date: April 10, 1996

Mr. Ben Siminoe
Assistant Forest Supervisor
Humboldt-Toiyabe National Forests
Northeast Nevada Ecosystem Coordination Center
976 Mountain City Highway
Elko, NV 89801

Dear Mr. Siminoe:

This responds to your notification that the Elko County District Attorney has requested that you appear and testify before the Elko County grand jury which was established by petition to, among other things, investigate alleged "violation[s] of the rights of the citizens of Elko County by Government agencies."[1] For the reasons set forth below, you are not authorized to appear and testify before the Elko County grand jury.

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[1]On March 4, 1996, the Elko County District Attorney formally served you with a subpoena directing that you appear and give testimony before the grand jury three days later, on March 7, 1996. In response to an emergency motion filed by the United States on March 6, 1996, the subpoena was quashed by the Elko County District Court that same day, March 6, 1996. Notwithstanding the fact that the subpoena was quashed, it is my understanding that the Elko County District Attorney has requested informally that you appear and provide testimony.

The Elko County District Attorney requested your appearance before the Grand Jury and I have deemed this to be a request pursuant to 7 C.F.R. § 1.214(b)(2). The United States Department of Agriculture (USDA) has established procedures which govern the appearance of USDA employees as witnesses in judicial or administrative proceedings when such appearance is in their official capacity or arises out of their employment with USDA. 7 C.F.R. § 1.210 et seq. In order to testify in any such proceeding, USDA employees must receive specific authorization to do so from their agency. Id. at § 1.212.

An employee of the USDA may appear and testify where the United States is not a party only is such appearance has been authorized based upon a determination that such appearance is in the interest of USDA." Id. at § 1.214.[2] In evaluating whether a USDA employee's appearance would be "in the interest of USDA," authorizing officials should consider, among other things, what interest of USDA would be promoted by the employee's testimony and whether the appearance would result in an unnecessary interference with the duties of the employee. Id. at § 1.214(e)(1)(i-ii).

Based on the information available to me as authorizing official, I have determined that your appearance to testify before the Elko County Grand Jury would not be in the interest of USDA. For the reasons detailed below, you are not authorized to testify before the Elko County Grand Jury.

1. The Elko County grand jury inquiry into Forest Service land management policies and procedures violates the Supremacy

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[2]In my capacity as Regional Forester for the Intermountain Region of the Forest Service, I have been delegated the responsibility to be the authorizing official on behalf of the Chief of the Forest Service. Id. at § 1.219(b)(2); FSM 1572.046, 1.b.

Clause of the United States Constitution.

The Elko County Grand Jury investigation appears to be in violation of federal law. The Supremacy Clause prohibits States from prosecuting federal employees for conduct that is within the scope of their authority under federal law. More generally, the Supremacy Clause prohibits a state grand jury from investigating the operations of a federal agency because such a proceeding necessarily interferes with and obstructs the functioning of the agency.

The information that I have received to date clearly indicates that the grand jury intends to investigate specific official policies, procedures and operations of the United States Forest Service and other federal land management agencies in Elko County. The petition requesting the formation of the grand jury plainly seeks to investigate and potentially prosecute federal employees for work done in their official capacity as federal land managers. For example, the Petition for an Elko County Grand Jury (Petition) states that one of the "specific facts" which necessitates the convening of a grand jury is "collusion between employees and officials of the Unites States Forest Service, preservationist groups, and possibly State officials, the goal of which collusion is unclear, but the effects of which are to severely limit, obstruct, or terminate all economic and recreational activity on public lands in Elko County." As the context makes apparent, the alleged "collusion" refers to nothing more that the land management decisions of federal employees.[3]

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[3]The other putative misconduct alleged in the petition to justify convening the Elko County grand jury also is imputed to federal employees acting in the performance of their official duties. The Petition contends that Nev. Rev. Stat. § 199.480(3)(b) which makes it a crime to "falsely and maliciously . . . procure another to be arrested or proceeded against for a crime" was violated when "certain officials of the United States

Perhaps more important, the Court impaneling the grand jury has instructed the jury that its authority is limited "to the subject matter of the petition." Grand Jury Instruction No. 3. The Court describes the subject matter of the investigation in a way that leaves no doubt that the grand jury is investigating federal officials for work done in their official capacity as land managers:

> It is this Court's observation that the primary concern of the petition is a call for the investigation, and the possible criminal prosecution, concerning the administration of public lands. Therefore, the Grand Jury shall initially be limited to this subject matter before proceeding further.

Id. (emphasis added). The Court repeatedly refers to the subject

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publicly alleged that crimes of violence or threatened violence have been committed or threatened by Elko County residents against Federal Agents, but no such crimes have been reported to responsible law enforcement officials." Second, it contends that Nev. Rev. Stat. §§ 199.230 and 199.480 (4)(f) which makes it a crime to commit acts which "pervert or corrupt public justice or the due administration of law, or which obstruct justice" was violated when a Forest Service employee gave "precise directions to Federal employees regarding how to hide communications from release under the Freedom of Information Act by deleting them or labeling them." I have been provided with no information whatsoever to substantiate these allegations and they appear frivolous on their face. Moreover, the Supremacy Clause prohibits state prosecution of federal employees acting within the scope of the federal authority regardless of whether their conduct facially violates state law. In any case, I question whether the petition alleges criminal conduct with sufficient specificity to comply with state law requirements. See Nev. Rev. Stat. § 6.130; Nevada Attorney General Opinion 274 (7/6/1953).

matter of the investigation as "public lands use" in the jury instructions. Id. at 3, 5, 7, 10, 11, and 13.

Other documents and County actions also show that this grand jury investigation is an improper investigation into federal land management decisions. While I am not according these newspaper reports much weight, the Elko Daily Free Press contains a number of articles which quote or paraphrase convening Judge Thomas Stringfield and District Attorney Gary Woodbury as saying that the purpose of the grand jury is to investigate federal land management. See articles dated September 19, 1995; October 19, 1995; November 3, 1995; November 9, 1995; November 24, 1995; February 8, 1996; and March 14, 1996. Consistent with the Judge's remarks and jury instructions, the District Attorney's office for Elko County, as part of the grand jury investigation, has sought documents from the Bureau of Land Management ("BLM") that relate solely to the official functions of that agency. Specifically, the Department of the Interior has informed us that the District Attorney's office requested "adverse grazing decisions" issued by the BLM as well as copies of BLM land management plans.

In a letter dated March 5, 1996, the Elko County District Attorney confirmed that the questions asked will relate to official functions of the Forest Service. That letter explains that you will be asked to testify "about Forest Service organization and land management policies in Elko County [as] essentially a background witness who can acquaint the Grand Jury with the rudiments of what the forest service does in managing the forest, and who does it, and how they do it." Most recently, the District Attorney, by affidavit, stated that you were subpoenaed to "provide general background information to the Grand Jury regarding Forest Service policy in areas where a spring existed on lands managed by the Forest Service which provided both habitat for wildlife, and served as a source of water for stockwatering or irrigation purposes for private permittees." Affidavit filed March 26, 1996. As clearly stated by the District Attorney, the requested testimony deals with the official function and operation of the United States Forest Service.

The ostensible function of the Elko County grand jury is to investigate allegations of criminal conduct by Forest Service employees acting in the course and scope of their employment and to recommend criminal prosecutions where the evidence so warrants. Because the nature of the inquiry of the Elko County grand jury is in violation of the Supremacy Clause of the United States Constitution, it is not in the interest of USDA to authorize your appearance and testimony.

2. The Elko County grand jury inquiry into Forest Service land management policies and procedures would be unduly burdensome.

Wholly apart from the legal infirmities outlined above regarding the Elko County grand jury, I believe that any time you spend appearing and testifying before this body would necessarily be time that you could not spend attending to your duties as Assistant Forest Supervisor of the Northeastern Nevada Ecosystem Coordination Center of the Humboldt-Toiyabe National Forests. As you are well aware, the workload on the National Forests has remained relatively constant or increased over the last several years while the staffing levels on the Forests have dropped. Consequently, Forest Service employees are being asked to assume more responsibilities. Although the County has not indicated how long your testimony will last, some interference with your duties is inevitable. I simply do not believe that testifying in this matter would be a beneficial use of your time in light of the workload that currently exists on the Humboldt-Toiyabe National Forests. Consequently, I do not believe that it is in the interest of the USDA for you to appear and testify.

The Elko County District Attorney advised in his March 26, 1996 affidavit that a number of Forest Service officials will be requested to testify before the grand jury. Testimony by additional Forest Service employees obviously would compound the problem

described above of taking those employees away from work during their duty hours. I believe the end result of authorizing the appearance and testimony of an unspecified number of Forest Service employees before the Elko County grand jury is that the agency would not be able to administer the Humboldt-Toiyabe National Forests in accordance with federal law and regulation.

Moreover, judging from the voluminous discovery - - 10 depositions taken thus far and as many as 16 being scheduled, and numerous document requests - - sought on one narrow issue of land management in Elko County, et al. v. Glickman, et al., I expect that the burden created by this much broader investigation into all aspects of public land management will be tremendous.

3. The Elko County grand jury would impermissibly intimidate and interfere with Forest Service employees acting in the course and scope of their employment.

Given that the purpose of a grand jury is to investigate allegations of criminal wrongdoing and given that the Elko County grand jury is investigating allegations of criminal wrongdoing by federal officials acting in the course and scope of their employment, I believe that authorizing the appearance and testimony of Forest Service employees before this body would, at a minimum, have a chilling effect upon those employees' ability to do their jobs. Indeed, the District Attorney in his March 26, 1996 affidavit has stated that such testimony is likely to be "under adverse conditions." Authorizing the testimony under such circumstances would thus permit, or could be perceived as permitting, harassment and intimidation of Forest Service employees. This would seriously and detrimentally impact the employees in the performance of their duties.

Yet another consideration constrains my decision. There has been an increasing tendency lately among certain western counties to challenge federal authority to manage public lands. Were the

USDA to authorize testimony in front of the Elko County grand jury in these circumstances, other counties might be emboldened to convene similar grand juries or otherwise undertake similar investigations. One of the leading proponents of the Elko County grand jury, Tony Lesperance, has indicated that he has had discussions with people from Eureka, Lander, Nye, and White Pine Counties in Nevada about the prospect of empaneling a grand jury to investigate public land management.

Thus, authorizing testimony in this case could eventually result in the Forest Service receiving numerous demands for testimony from other grand juries or investigatory bodies, with the concomitant disruption of employees' duties, inhibition on employees' performance of their duties, as well as interference with the Forest Service's ability to carry out its mission in the management of public lands.

4. The information sought by the Elko County grand jury is publicly available.

Balanced against these important legal and policy concerns is the modest need of the grand jury for your testimony. As noted earlier, the Elko County District Attorney informed the Department of Justice in a letter dated March 5, 1996 that you would essentially be a "background witness who can acquaint the Grand Jury with the rudiments of what the Forest Service does in managing the forest,. and who does it, and how they do it." This information is publicly available and is routinely provided by the Forest Service to citizens requesting it. Most, if not all, of this information can be acquired through informal discussion with Forest Service officials or by requesting copies of material that is available to the general public. The Freedom of Information Act provides a more formal means by which the sought after information may be acquired. In addition, the Forest Service Elko office has made space available so that members of the public may read documents relating to the management of National Forest System lands. The Forest Service also responds to written requests

for information.

Either mechanism, informal or formal, is less confrontational, less time consuming, and less expensive than testifying before a grand jury. By copy of this letter, I would encourage the Elko County District Attorney to take advantage of these other alternative options.

In summary, the Elko County grand jury before which you have been requested to testify is unconstitutional. In addition, any testimony by your before this body would present an undue burden to the Forest Service in the administration of the Humboldt-Toiyabe National Forests and would impermissibly constrain Forest Service employees acting in the course and scope of their employment. Finally, other less confrontational, less time consuming, and less costly mechanisms are available by which the background information sought by the Elko County grand jury can be obtained. For these reasons, I have determined that your appearance and testimony before the Elko County grand jury is not authorized because it is not in the interest of the USDA.

Sincerely,

/s/ Dale N. Bosworth

DALE N. BOSWORTH
Regional Forester

cc:
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(2)

Supreme Court, U.S.
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No. 97-453

# In the Supreme Court of the United States

OCTOBER TERM, 1997

ELKO COUNTY GRAND JURY, PETITIONER

*v.*

BEN SIMINOE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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HPP

## QUESTION PRESENTED

Whether the court of appeals correctly concluded that neither a Nevada state court nor a federal district court on removal pursuant to 28 U.S.C. 1442(a)(1) had jurisdiction to compel a federal officer to testify before a county grand jury.

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-453

ELKO COUNTY GRAND JURY, PETITIONER

*v.*

BEN SIMINOE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 109 F.3d 554. The order of the district court (Pet. App. B1-B2) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 19, 1997. The petition for a writ of certiorari was filed on June 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. a. Under Nevada law, private citizens may petition a state district court to convene a grand jury. The state court must convene a grand jury if the petition submitted "contain[s] the signatures of reg-

istered voters equal in number to 25 percent of the number of voters voting within the county at the last preceding general election." Nev. Rev. Stat. Ann. § 6.130(1) (Michie 1986).

In 1995, residents of Elko County, Nevada, circulated a petition requesting an investigation into "violation[s] of the rights of the citizens of Elko County by Government agencies." Pet. App. C1. The petition called for a grand jury to investigate alleged "collusion between employees and officials of the United States Forest Service, preservationist groups, and possibly State officials, * * * the effects of which are to severely limit, obstruct, or terminate all economic and recreational activity on public lands in Elko County." *Id.* at C3.

In February 1996, a Nevada state court empaneled the Elko County Grand Jury. In its instructions to the grand jury, the court declared that the grand jury's mission was "the investigation, and the possible criminal prosecution, concerning the administration of public lands." Pet. App. C4.

b. On March 4, 1996, the grand jury issued a subpoena for the testimony of Ben Siminoe, an employee of the United States Forest Service, an agency within the United States Department of Agriculture (USDA). Pet. App. C1 n.1. By letter dated March 5, 1996, the Elko County District Attorney confirmed that Siminoe would be asked to testify "about Forest Service organization and land management policies in Elko County," and that he would be "essentially a background witness who can acquaint the Grand Jury with the rudiments of what the forest service does in managing the forest, and who does it, and how they do it." *Id.* at C5.

On March 6, 1996, in response to an emergency motion filed by the United States, the state court quashed the subpoena and stayed similar process issued to federal officials to allow further consideration. Pet. App. C1 n.1. Notwithstanding that order, the Elko County District Attorney informally reiterated his request that Siminoe testify. *Ibid.*

By letter dated April 10, 1996, Siminoe's superior directed him not to appear before the grand jury. Pet. App. C. The directive was issued pursuant to Department of Agriculture regulations, sometimes referred to as "*Touhy* regulations,"[1] that govern testimony by federal employees. See 7 C.F.R. 1.210-1.214. The USDA *Touhy* regulations prohibit agency employees from appearing to give testimony "when such appearance is in their official capacity or arises out of or is related to their employment with USDA," unless the agency specifically authorizes the testimony. 7 C.F.R. 1.210, 1.214(b).

On May 3, 1996, the state court lifted its stay of the grand jury's issuance of process to federal employees, agents and officials. The state court ruled that the grand jury could subpoena a federal official and, upon the refusal of the federal official to honor the subpoena, could petition the state court for a bench warrant. Pet. App. A4.

2. After the subpoena reissued, Siminoe, represented by the Department of Justice, removed the pro-

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[1] The term "*Touhy* regulations" refers to regulations promulgated by an agency under 5 U.S.C. 301 to govern agency employee conduct in responding to requests or demands made upon them for information. The name derives from this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), which involved such regulations.

ceeding to the United States District Court for the District of Nevada pursuant to 28 U.S.C. 1442(a)(1).[2] He argued that the subpoena should be quashed on three grounds. First, sovereign immunity barred enforcement of a grand jury subpoena issued to a federal employee for testimony regarding his federal employment. Second, Siminoe could not be compelled to testify in contravention of a directive issued by his agency pursuant to its *Touhy* regulations. Third, the grand jury's investigation into federal land management was in derogation of intergovernmental immunity and the Supremacy Clause.

On July 12, 1996, the federal district court issued a minute order quashing the subpoena and denying petitioner's motion to remand the case to state court. Pet. App. B.

The court of appeals affirmed. Pet. App. A. The court initially noted that the jurisdiction of the federal district court on removal pursuant to Section 1442(a)(1) was derivative of the state court's jurisdiction. *Id.* at A4 (citing *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922)). The court further explained that, in the absence of an applicable waiver of sovereign immunity, the state court lacked jurisdiction to determine whether USDA had correctly invoked its *Touhy* regulations, or to issue a bench warrant for the arrest of a federal employee based on such a determination. *Id.* at A5-A6. Accordingly, the court of appeals held that neither the state court nor the district court on removal had

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[2] The federal officer removal statute "ensure[s] a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981).

jurisdiction to enforce the subpoena. The court of appeals also pointed out that the "appropriate means" for seeking review of USDA's invocation of its *Touhy* regulations would be a suit filed in federal district court pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 702. Pet. App. A7 n.1.

## ARGUMENT

The court of appeals' conclusion that neither the state court nor the federal district court on removal had jurisdiction over this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's proceeding in state court to enforce a state grand jury subpoena against Siminoe is barred by the *Touhy* doctrine and federal sovereign immunity.

1. In *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), this Court held that a subordinate federal agent could not be held in contempt for refusing to obey a subpoena when the Attorney General, acting pursuant to valid federal regulations governing the release of official documents, had ordered him to refuse to comply. *Id.* at 469. Similarly here, the Forest Service directed Siminoe not to testify pursuant to a USDA regulation prohibiting its employees from appearing in "a judicial or administrative proceeding unless authorized in accordance with this subpart." 7 C.F.R. 1.212. Thus, the *Touhy* doctrine bars any court—whether a state court or a federal court on removal—from enforcing a state court subpoena directing Siminoe to appear in contravention of his agency's directive. See, *e.g.*, *In re Boeh*, 25 F.3d 761, 764 (9th Cir. 1994), cert. denied, 513 U.S. 1109 (1995).

Moreover, because "the *Touhy* doctrine is jurisdictional," it "precludes a contempt action regardless of whether [the regulation] is ultimately determined to protect the requested testimony." *Swett* v. *Schenk*, 792 F.2d 1447, 1452 (9th Cir. 1986). As the court of appeals observed, if petitioner wished to challenge the merits of USDA's decision under its regulations, the proper forum for that challenge would have been in federal district court, in an action against the agency itself under the APA, 5 U.S.C. 702. Pet. App. A7 n.1.[3]

2. Petitioner's claim is independently barred by federal sovereign immunity. Courts have long held that a suit "against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to governmental privilege of immunity." *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 69 (4th Cir. 1989) (citing *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). If, as here, an officer's refusal to testify is at the behest of his agency superior based on the agency's validly promulgated *Touhy* regulations, then that refusal is within the scope of the officer's delegated authority. Absent a waiver of sovereign immunity, a state court (or a federal court on removal) does not have jurisdiction over a suit against a federal officer with regard to matters within the officer's scope of employment. Since the United States has nowhere consented to state subpoena enforcement actions

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[3] The federal courts have exclusive jurisdiction over such claims. See *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 71 (4th Cir. 1989) ("Congress has expressly limited [APA] review to the federal courts, and a state court's assertion of the power of judicial review over federal agencies directly contravenes 5 U.S.C. § 702.").

against its officers and employees, the courts of appeals have consistently held that sovereign immunity bars enforcement of subpoenas issued by state courts to federal employees. See, *e.g.*, *Edwards* v. *United States Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994); *Louisiana* v. *Sparks*, 978 F.2d 226, 234-235 & n.16 (5th Cir. 1992); *Boron Oil*, 873 F.2d at 70.

Petitioner relies (Pet. 10-11) on *Florida* v. *Cohen*, 887 F.2d 1451 (11th Cir. 1989), in which the Eleventh Circuit on removal addressed the merits of a federal agency's directive to certain employees to refuse to comply with a state court subpoena. However, the *Cohen* court did not consider whether sovereign immunity barred the court from reaching the merits, since "[n]either party challenge[d] the district court's determination that the refusal of the federal officials to provide the requested information should properly be assessed as an invocation of privilege to be evaluated by the federal courts." *Id.* at 1454.[4] Some courts have held that, once an agency consents to be sued, a court may consider whether an agency's refusal to produce information is justified by federal privilege law because, "[h]aving consented to suit, the United States should be held to have placed itself in the position of an ordinary litigant before the court, to whom the rules of civil procedure ordinarily apply." *Mosseller* v. *United States*, 158 F.2d 380, 382 (2d Cir. 1946). But no such theory of sovereign immu-

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[4] In another case cited by petitioner (Pet. 12), *Kansas* v. *Call*, 760 F. Supp. 190 (D. Kan. 1991), aff'd, 961 F.2d 220 (10th Cir. 1992) (Table), the district court similarly failed to address the issue of federal sovereign immunity before reaching the merits of whether federal employees could properly refuse to answer a state subpoena under the agency's *Touhy* regulations. *Id.* at 192.

nity waiver applies here, where the federal official was subpoenaed by a state court, and the agency invoked the sovereign immunity of the federal government. Moreover, it is well-established that, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974)). By the same token, because the *Cohen* court did not explicitly consider the scope of its jurisdiction, its decision does not give rise to a circuit conflict warranting resolution by this Court.[5]

Petitioner also claims that the district court should have considered the validity of USDA's *Touhy* regulations, since "[i]nvocation of sovereign immunity as a defense which prevents the contempt action requires valid regulations, for if the refusal is not authorized, the employee cannot be acting on behalf of the United States." Pet. 14-15 (citing *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*). That argument is without merit because "[t]he doctrine of

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[5] Petitioner also cites (Pet. 12) *Dent* v. *Packerland Packing Co.*, 144 F.R.D. 675, 679 (D. Neb. 1992), for the proposition that a federal district court on removal may evaluate the merits of an officer's refusal to comply with a state court subpoena. However, the *Dent* court's holding was erroneous because the cases upon which it relied, *Moore* v. *Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991), and *Davis Enterprises* v. *United States Environmental Protection Agency*, 877 F.2d 1181 (3d Cir. 1989), cert. denied, 493 U.S. 1070 (1990), both originated in federal court. The APA's waiver of sovereign immunity is applicable to actions originating in federal court. See 5 U.S.C. 702.

sovereign immunity precludes the state court—and the federal court which gained limited jurisdiction upon removal—from exercising jurisdiction to compel [a federal officer] to testify contrary to [agency] instructions, and also denies it the authority to review and set aside the [agency's] decision and the federal regulations under which it is made." *Boron Oil*, 873 F.2d at 70.

3. As noted above, the appropriate method for challenging a federal agency's *Touhy* regulations is to bring an APA action against the agency itself in federal court. Petitioner contends for the first time before this Court (Pet. 9) that the district court had jurisdiction to "convert the contempt action to an action under the [APA]," and should have done so of its own accord. Petitioner relies (Pet. 11) on *Edwards* v. *United States Department of Justice*, *supra*, in which a district court converted a state subpoena enforcement action, which had been removed to federal court pursuant to 28 U.S.C. 1442, into an APA challenge. However, in that case, "[t]he parties and the district court * * * agreed to recast the federal proceeding as an APA claim." 43 F.3d at 314. There was no such agreement here. Moreover, petitioner did not argue to the court of appeals that its suit should have been "converted" into an APA challenge, nor did it cite *Edwards* in its brief.[6]

At the very least, it was not an abuse of discretion for the district court to decline to convert the action from a simple contempt proceeding against a federal officer into an APA action against the agency itself.

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[6] The government did cite *Edwards* twice in its court of appeals brief, but for completely unrelated propositions. Gov't C.A. Br. 10, 11.

Even assuming that the federal district court would have jurisdiction to do so on removal from state court, to convert a contempt proceeding into an APA action would stretch the liberal pleading rules beyond their logical scope, and might raise additional problems of personal jurisdiction and venue. It thus is not surprising that the vast majority of courts confronted with this situation have indicated that the proper course for litigants in petitioner's situation is to bring a *separate* APA challenge in federal court. See, *e.g.*, *Swett*, 792 F.2d at 1452 n.2; *Houston Business Journal, Inc.* v. *Office of Comptroller of Currency*, 86 F.3d 1208, 1212 n.4 (D.C. Cir. 1996). See also *In re Boeh*, 25 F.3d at 764 ("We understand * * * that it may be more cumbersome to challenge an assertion of privilege by an APA suit or mandamus action, but *Touhy*, *Sackett* and *Swett* preclude litigants and courts from first pursuing the option of contempt proceedings against subordinate officials who have been denied permission to respond to a subpoena.").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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